Supreme Court, U.S.
F I L E D
OCT 28 1987
JOSEPH F. SPANIOL, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-304

WILLIAM LEIGHTON,

Petitioner,

v.

BEATRICE COMPANIES, Inc. et al.

Kohlberg, Kravis, Roberts & Co.

and Joel B. Smilow,

James L. Dutt,

Respondents.

PETITIONER'S FIRST SUPPLEMENTAL BRIEF AND APPENDIX

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Purpose

In accordance with Rule 22.6., petitioner respectfully submits this Supplemental Brief to call the Court's attention to a new case and other intervening matter not available at the time of the filing of petitioner's Reply Brief.

This new matter will refute some of respondent's "footnote" arguments and assertions of fact which should have been presented to the courts below in the first place.

1. The respondents' Rule 28.1 Statement is defective and misleading

Six days after the filing in this Court of respondents' Brief in Opposition, a prospectus of Union Texas Peetroleum Holdings, Inc., ("Union Texas") became effective, on September 24, 1987. In it, KKR discloses that, as of June 30, 1987, it controlled through certain partnerships, 49.7% of Union

Texas and that after September 24, 1987, it would control, through such partnerships, 39.2% of the voting power of Union Texas. KKR also discloses that it had acquired this interest in July, 1985. The prospectus states that Union Texas has been approved for listing on the N.Y.S.E. Relevant portions of this prospectus are in the Appendix hereto, R. 101a.

In their Rule 28.1 Statement the respondents have not listed Union Texas among the corporations controlled by KKR, and for good reason from their point of view. The structure of KKR's Union Texas investment is that of an investment company, KKR, controlling the partnerships that beneficially own KKR's portion of Union Texas. This brings the transaction squarely within the coverage of Section 3(a) of the 1940 Act.

The same structure exists

with respect to KKR's control of Beatrice through BCI. The record below shows that, in 1985, KKR has created the "Kohlberg Kravis Roberts & Co. 1986 Investment Fund Partnerships". Under KKR's control, these partnerships have invested in Beatrice common stock enabling KKR to produce a majority vote in favor of the merger. The partnerships' investments were taken over by BCI at merger time, April 17, 1986, with money borrowed from the banks and the debenture holders. The point was noted by the Delaware Supreme Court which, in its August, 1986 Order, R. 46a - 47a, requested special briefing.

Yet, at footnote 10 on page 12 of their Brief in Opposition, the respondents claim :

> KKR is not an investment company because it is neither an issuer nor an entity engaged in the activities enumerated in Section 3(a) (of the

1940 Act)."

KKR's presentation of the facts should have been made in the first instance to the S.E.C. which alone could have granted BCI a temporary or permanent exemption from the 1940 Act in accordance with the procedures prescribed by Section 3(b)(2) thereof.

KKR has never applied for such an exemption whether for itself or for BCI for the obvious reason that it could not have done so "in good faith". Now, KKR is seeking a determination by this Court of facts that would sustain an exemption from the Act. Since compliance with the statute would not have enabled KKR to realize hundreds of millions of dollars in profits, KKR has simply ignored it. According to the September 6, 1987 issue of the New York Times, "billions of dollars were shaken from Beatrice". The Wall Street Journal of

September 4 agreed, stating that the "Beatrice buy-out may net investors a fivefold return."

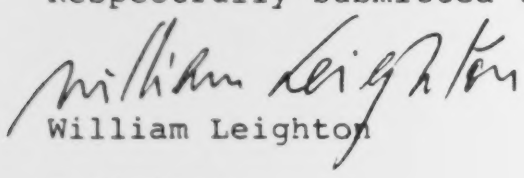
2. BCI is currently involved in litigation concerning the amendment of the indentures with respect to some or all of its Regulation G indebtedness which it incurred in April, 1986 in connection with its acquisition of Beatrice. There is included in the Appendix hereto, R. 105a, a decision by a New York State court, filed June 25, 1987, denying a motion for a preliminary injunction. Notably absent from that court's reasoning is any reference to the Trust Indenture Act of 1939 which would govern the disposition of any such suit.

Clearly, BCI is continuing its activities in violation of Section 7(a)(2) of the 1940 and is frustrating the powers of State equity courts to carry out their functions under Section 44 of the Act. This is the direct result

of the Delaware courts' refusal to enforce Section 7(a) in the context of the case before this Court.

Had the New York State court known that BCI is engaged in the continuing violation of Section 7(a) and exists in defiance thereof, it might have granted the injunction on the ground that BCI was before it with "unclean hands".

Respectfully submitted :



William Leighton

Petitioner

PROSPECTUS

18,000,000 Shares

UNION TEXAS PETROLEUM HOLDINGS, INC.

Common Stock

(par value $.05 per share)

* * * * * * * * *

The Common Stock has been approved for listing on the New York and Pacific Stock Exchanges

* * * * * * * * * * * * * * * * * * *

The date of this Prospectus is September 24, 1987

* * * * * * * * *

The Company

General. The Company is the largest independent (non-integrated) oil and gas company in the United States, with world wide operations and proved oil and gas reserves of 511 million boe (sic) as of December 31, 1986. * * * *

Principal Shareholders. From 1962 until July 1985, the Company and its

predecessors were operated as wholly-operated subsidiaries or unincorporated divisions of Allied, a wholly-owned subsidiary of Allied-Signal, Inc. ("Allied-Signal"). In July, 1985, the KKR Partnerships, which are controlled by an affiliate of Kohlberg Kravis Roberts & Co. ("KKR"). purchased approximately 50% of the Common Stock of the Company ("the 1985 Stock Acquisition"). * * * * * (emphasis supplied).

* * * * * * * * * *

MANAGEMENT

Directors and Executive Officers* * *

Jerome Kohlberg, Jr. has been a director since July, 1985. Mr. Kohlberg was a partner in KKR from its organization in 1976 until 1987, when he became a partner in Kohlberg & Co., a merchant banking firm. Mr. Kohlberg is a limited partner in KKR. He is also a director of L.B. Foster Company, Motel 6 G.P., Inc., PACE Group Holdings, Inc. PACE INDUSTRIES,

Inc., Storer Communications, Inc., Fred Meyer, Inc., Houdaille Holding Corp., SCI Holdings, Inc. and BCI Holdings Corporation.

Henry R. Kravis has been a director since July, 1985. Mr. Kravis has been a partner in KKR since its organization in 1976. He is also a director of BCI Holdings Corporation, Houdaille Holdings Corp., Motel 6 G.P., Inc., Owens-Illinois, Inc., PACE Group Holdings, Inc., PACE Industries, Inc., SCI Holdings, Inc., Storer Communications, Inc., L.B. Foster Company, Safeway Stores Holding Corporation and AFP G.P., Inc.

George R. Roberts has been a director since July, 1985. Mr. Roberts has been a partner in KKR since its organization in 1976. He is also a director of BCI Holdings Corporation, Beatrice Companies,

Inc., Houdaille Holding Corp., Motel 6 G.P., Inc., Owens-Illinois, Inc., PACE Group Holdings, Inc., PACE Industries, Inc., Red Lion Properties, Inc., SCI Holdings, Inc., Storer Communications, Inc., Safeway Stores Holding Corporation and AFP GP, Inc. Mr. Roberts is a first cousin of Mr. Kravis.* * *

SUPREME COURT : NEW YORK COUNTY

INDIVIDUAL ASSIGNMENT SYSTEM, Part 8

- -

GEORGE PISIK, on behalf of himself and all other holders of the Debt Securities of BCI Holdings Corporation similarly situated,

Plaintiff,

vs.

BCI HOLDINGS CORPORATION,

Defendant.

- -

Index No. 14593/87 - Filed June 25, 1987

WILLIAM P. McCOOE, J.:

Plaintiff moves pursuant to CPLR 6301 for a preliminary injunction.

In April, 1986 defendant BCI was incorporated in Delaware in connection with a leveraged buyout and issued $2.5 billion in debt securities in four series

of notes or debentures. Each series is governed by an Indenture dated April 15, 1986 selecting New York both as a forum and for the governing law (Sec. 12.08) and providing for the adoption of amendments (such as those now proposed by BCI) by the written consent (vote) of the holders of a majority in principal amount of the securities then outstanding (Sec. 9.02). After approval all security holders are bound (Sec. 9.04). To further its present restructuring program BCI is proposing amendments to its debt holders by dissemination of a consent solicitation statement dated May 21, 1987, and an amendment dated June 15, 1987 which offer to pay cash consideration (either $12.50 or $10.00 per $1,000 of debt) to holders who consent to the amendments while paying nothing to debt holders who refuse or fail to consent but will nevertheless be bound upon their adoption. While the

period for solicitation of consent expires on June 24, 1987, if the number of consents is then insufficient BCI will continue to accept consents thereafter.

Plaintiff attempts to address the prerequisites to the grant of a preliminary injunction set forth in Albini v. Solork Assoc., 37 AD2d 835, namely, a likelihood of success on the merits, irreparable harm and a favorable balance of equities.

Plaintiff bases its likelihood of success on the merits upon an alleged public policy in New York against "vote buying" including N.Y.S. Const., Art. 2 Sec. 3, Election Law, Sec. 17.142 and BCL (Business Corporation Law) Sec. 609(e) while conceding that none of these authorities expressly governs a solicitation of the holders of debt securities. Plaintiff adds that the consent solicitation program also violates both the

Indentures, which do not contemplate such activity, and the contractual implied convenant of good faith and fair dealing. Plaintiff argues that irreparable injury will lie in the event the Court later determines the amendments were illegal. Plaintiff urges the implementation of the amendments could have a drastic effect on holders while the equities of defendant BCI are slight as is the effect of the grant of relief to plaintiff.

Plaintiff's motion for a preliminary injunction must be denied since plaintiff has not met the Albini requirements nor has he shown a clear right to relief. Gulf & Western Corp. v. The New York Times, Co., 81 AD2d 772, 773.

Plaintiff has no likelihood of success on the merits since defendant BCI's consent solicitation of its holder-creditors does not violate any

public policy against "vote buying", Kass v. Eastern Airlines, Inc., Del. Ch., Civ. Action Nos. 8700, 8701, 8711 (slip op., Nov. 14, 1986); Katz v. Oak Inds., Inc. 508 A. 2d 873, (Del. Ch. 1986). The two Delaware cases, like the present one, involved a debtor-creditor rather than a shareholder relationship with the latter's attendant fiduciary duties. Plaintiff concedes that the constitutional and statutory authorities he cites do not expressly extend to the present solicitation. Considerations of public policy which apply in the political or shareholder areas are less apparent in the largely unregulated field of bondholder voting rights. Nor does defendant's consent solicitation violate any implied term of the Indentures. While New York law recognizes an implied convenant of good faith and fair dealing in every contract, Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, the

Delaware court in both Eastern Air Lines and Oak Industries, applying New York law, rejected those plaintiffs' attempts to reform the Indentures thereby. See also Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329. Plaintiff cannot demonstrate irreparable injury since only monetary damages are involved, Fair Sky, Inc. v. Int't Cable Ride Corp., 23AD2d 633, and he is damaged only if he could eventually prove diminution in the value of his securities. Morgan Stanley & Co., v. Archer Daniels Midland Co., 570 F. supp. 1529, 1534.

Plaintiff does not show a favorable balancing of the equities since the denial of relief will permit each bond holder to make a market-type choice as to the adequacy of consideration being offered while a preliminary injunction would allow debt holders to conclude plaintiff's claim was favorably

adjudicated. Sherman v. Posner, 266 F. Supp., 871, 874.

The Court is not required to pass upon the remaining issues raised by defendant such as plaintiff's standing as a bond holder or alleged delay in the present application. Nevertheless the Court notes the existence of a separate ground for dismissal of the action in plaintiff's failure to satisfy a contractual condition precedent to its commencement. Section 6.06 of the Indentures requires that the holders of a majority of the securities must request the Trustee to commence the action, offer to indemnify the Trustee and afford the Trustee 60 days to comply. This standard Indenture requirement has been upheld consistently as a reasonable restriction on the freedom of action of individual bondholders. Sutter v. Hudson Coal Co., Tietjen v. United Post Offices Corp., 167

A. 846 (Del.Ch. 1933); Dillon v. Elmore, 198 N.E. 128 (Ill. Supr., 1935).

Plaintiff's motion for a preliminary injunction is denied.

This is the Decision and Order of the Court.

Dated June 21, 1987 /s/ William P. McCooe

J.S.C.